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Case No. 96-958

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,
Petitioner,

v.

RICHARD BING GWONG,
Respondent.

RESPONSE TO PETITION FOR CERTIORARI

Indigent Respondent

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AS TO THE PETITIONER'S STATEMENT OF THE CASE

The petition for writ of certiorari fails to put the issue in this case in accurate and proper context. Missing from the petition is the important course of events regarding just how the Florida Department of Corrections ("the department"), which has been affording inmates the ability to earn incentive gain time per the provisions of section 944.275(4)(b), Fla. Stat. (1985) for more than twenty years, suddenly stopped doing so. The department's action was not taken based upon authority granted to it by the Florida Legislature -- on the contrary it did so in contravention of the Legislature. The department proceeded solely upon a flawed opinion issued by the attorney general of Florida -- an opinion specifically disapproved by the Florida Supreme Court in **Gwong v. Singletary**, ___ So. 2nd ___ (21 Fla. L, Weekly, S430, Fla. October 10, 1996). (See the Petition for Writ of Certiorari, Appendix, A-10.) In this regard, we note the following:

Mr. Gwong is a Florida prisoner serving a 22 year prison sentence for second degree murder committed on January 13, 1987. He was sentenced on February 24, 1989 in Pinellas County, Florida Circuit Court Case No. 87-529-CF. He has not yet served 85% of the sentence. (The Petition for Writ of Certiorari, Appendix, A-2.)

On January 13, 1987, the date of the commission of the

Mr. Gwong's crime, section 944.275, Florida Statutes (1985), provided in part that Gwong was eligible to earn what is called "incentive gain time" as follows:

> "(4)(b) For each month a prisoner works diligently ...the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly."

(Petitioner's Appendix to Petition for Certiorari, at A-2.)

On October 1, 1995, Florida's "85%" law went into effect. That law requires all prisoners to serve at least 85% of their sentences regardless of any other statutory provision which might enable an inmate to serve less than that percentage. However, the 1995 statute was expressly limited to "sentences imposed for offenses committed on or after October 1, 1995." See s. 2, Ch. 95-294, Laws of Florida (1995), §944.275(4)(b)(3), Fla. Stat. (1995), emphasis supplied. This is important because it demonstrates that the Florida Legislature, respecting the *Ex Post Facto* clause of the United States Constitution, took pains to comply with it and make the new law apply prospectively only.

On March 20, 1996, the Florida attorney general acting unilaterally and contrary to the prospective application of the Florida Legislature's "85% law," issued AGO Opinion 96-22, which provided that the "85% law" could be applied to violent and sex offenders who committed their crimes before October 1, 1995 as well and concluded,

> "that the department could exercise its 'dis-

cretion' under the statute by adopting a rule that prohibited certain classes of inmates from receiving incentive gain-time."

(See the Petition for Writ of Certiorari, Appendix, A-3, quoting the Supreme Court of Florida in **Gwong v. Singletary**, supra.)

Acting on the attorney general's opinion, on April 21, 1996, the department adopted Fla. Admim. Code Rule 33-11.0065 (1996), which had the effect of making Gwong and others similarly situated ineligible to earn incentive gain time after that date if they had 85% or less of any sentence remaining to be served. That rule provided in part:

"Rule 33-11.0065 Incentive Gain Time

(1) Ineligibility

(a) No inmate shall receive or accumulate gain time:

* * * * *

6. If convicted of any of the following offenses committed before October 1, 1995 and has 85% or less of any sentence remaining to be served. The provisions of (1) (a) 6. shall also apply to work, extra, and constructive gain time for inmates convicted of offenses committed between July 1, 1978 and June 14, 1983."

(See the Petition for Writ of Certiorari, Appendix, A-3.) This is followed by an enumeration of offenses which make violent/sex inmate ineligible to "...receive or accumulate (incentive) gain-time" and includes violent and sex offenders. (Id.) Based upon the new rule, effective April

21, 1996 the department illegally denied Mr. Gwong and other similarly situated prisoners eligibility to earn up to 20 days per month of incentive (work) gain time.

Gwong challenged the rule by filing a petition for writ of mandamus in the Florida Supreme Court. On October 10, 1996, that court ruled unanimously in part that:

> "Given that the amendment (1) applies to a class of inmates who committed their offenses before the amendment's effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of certain inmates to earn incentive gain-time credits, we are compelled to conclude that it violates the ex post facto prohibition."

(See Petition for Writ of Certiorari, Appendix, at A-10.)

On October 22, 1996, the attorney general filed a motion for rehearing, clarification and issuance of order staying finality of the opinion pending review by this court. A copy of the motion is found in petitioner's Appendix to the Certiorari Petition at A-32-36. On November 22, 1996 the Supreme Court of Florida denied the motion. (Petitioner for Writ of Certiorari, Appendix, at A-12-15.) On or about October 22, 1996, the attorney general of Florida filed a petition for certiorari and application for a stay of the finality of the Supreme Court of Florida's decision in **Gwong**, supra, in this court. Thereafter, this honorable court denied the attorney general's application for a stay.

REASONS FOR DENYING THE PETITION AND NOT ISSUING THE WRIT

Review should not be granted because there is no

> conflict between this court's most recent decisions and the decision below in **Gwong v. Singletary**. Furthermore Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985), is not a "purely discretionary" statute. Finally, there is no confusion or tension in Florida between ex post facto limitations and the right of this state to manage its prisons.

This Very Same Issue Has Been Decided By This Honorable Court Previously.

The Florida attorney general fails to advise that this same issue came on for requested review via a petition for writ certiorari in 1989. The request was denied. Thus, in **Raske v. Martinez**, 876 F.2d 1496 (11th Cir. 1989), the United States Eleventh Circuit Court of Appeals, reviewing exactly the same Florida statute (section 944.275[4][b], Fla. Stat.) and exactly the same issue as in the case at bar -- determined that the *Ex Post Facto* clause of the United States Constitution clearly prohibited Florida from enacting a statute which had the effect of a retroactive reduction in the ability of a Florida prisoner to earn incentive gain time. The **Raske** court addressed in great detail the petitioner's claim that incentive gain time is "purely discretionary" (the certiorari petition, page 4) holding:

> "We agree, of course, that incentive gain time is discretionary. We note however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain time for that work, despite its so-called "discretionary" nature.

See Pettway v. Wainwright, 450 So.2d 1279 (Fla. 1st DCA 1984)."

Raske, supra, 876 F.2d at 1499. (Emphasis supplied.) The **Raske** court added at 876 F. 2d 1499:

> "We see no fundamental distinction between the conditions that a prisoner must satisfy to receive basic gain time and the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time. We therefore reject the State's attempt to distinguish the 1983 act from the 1978 act at issue in Weaver by a supposed distinction between the nature of basic and incentive gain time."*

(Emphasis supplied.)

The Supreme Court of the United States denied certiorari in **Raske** on December 4, 1989. See **Raske v. Martinez**, supra, 110 S. Ct. 543, 493 U. S. 993, 107 L. Ed. 2nd 540.

The Decision Of The Supreme Court Of Florida Is Proper And Consistent With The Laws Of This State.

In the case at bar, Florida's unconstitutional conduct is even worse because as Justice Overton writing for a unanimous Florida Supreme Court noted a state may not do by administrative rule that which it cannot do by statute. Specifically, Justice Overton wrote:

"By amending the rule, the department seeks to do

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* Thus petitioner's claim that this honorable court held in **Weaver v. Graham**, 450 U.S. 24,35 (1981) that Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985), is "purely discretionary" is incorrect. This honorable court did not have the incentive gain time statute before it in **Weaver** -- and the comment is dicta.

what the legislature cannot even though the department itself is created by the legislature and acts in a quasi-legislative capacity. **As the department conceded at oral argument, if the legislature had passed a statute retrospectively eliminating Gwong's eligibility for incentive gain-time, the statute would violate the ex post facto clause.** Simply because the amendment is an administrative regulation rather than a law does not alter the application of the ex post facto clause. Such an argument fails to 'acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto.' Weaver, 450 U.S. at 31."

(The Petition for Certiorari, Appendix, A-10, emphasis supplied.)

As To Petitioner's Claim That The **Gwong** Decision Conflicts With **Weaver v. Graham, Collins v. Youngblood** And **California** Dept. of Corrections v. Morales Is Incorrect.

The Supreme Court of Florida took great pains to consider, analyze and scrupulously follow **Weaver v. Graham,** 450 U. S. 24 (1981) -- as well as **Collins v. Youngblood,** 497 U.S. 37 (1989) and **California Department of Corrections** v. **Morales,** ___ U.S. ___, 115 S. Ct. 1597 (1995) -- to the extent that those decisions modified **Weaver** -- in the course of arriving at its decision in **Gwong.** In this regard, the Florida Supreme Court first noted (See the Petition for Certiorari, Appendix, at A-5):

"In evaluating whether a law violates the ex post facto clause, a two-prong test must be applied: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which

a crime is punishable. California Dep't of Corrections v. Morales, 115 S. Ct. 1597, 131 L. Ed. 2d. 588 (1995)."

This recitation of the test for determining whether state action runs afoul of the *Ex Post Facto* clause is entirely consistent with the decisions of this court in **Morales** and **Collins.**

The Florida Supreme Court then applied the holdings in those cases to the situation in the case at bar noting (see the Petition for Certiorari, Appendix, A 5,6):

> "In applying this test to the instant case, we are presented with nearly the identical situation we evaluated in Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). In Waldrup, the prisoner had been sentenced for crimes committed in 1980 and 1982. In 1983, the legislature amended section 944.275 to decrease the possible award of incentive gain-time, which, in turn, had the effect of possibly increasing the prisoner's sentence. We first concluded that the change in the statute operated retrospectively because it applied to a large class of inmates whose offenses occurred before its effective date. Under the second prong, we concluded that the statute was ex post facto because it was more onerous than the law in effect on the date of the offense. See Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). This was true even though a prisoner had but a 'mere expectancy' in the availability of incentive gain-time. 450 U.S. at 30 (a law need not impair a "vested right" to violate the ex post facto prohibition; it need only make the punishment more onerous than the law in effect at the time the offense was committed). This is because 'a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' 450 U.S. at 32. Like the situation in both Waldrup and Weaver, the instant rule amendment (1) applies to a class of inmates who committed their offenses before the amendment's

effective date and (2) acts to enhance the measure of punishment because it eliminates the ability of an inmate to earn incentive gain-time credits."

Furthermore, the Florida Supreme Court recognized the extent to which this court's decision in **Weaver** was modified by **Collins and Youngblood**, stating (see the Petition for Certiorari, Appendix, at A-6,7):

> "In comparing the instant case to Waldrup and Weaver, we note that the United States Supreme Court has somewhat altered the second prong from how it was set forth in those cases. See Morales; Collins v. Youngblood, 497 U.S. 37, 100 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). In Weaver, the Court concluded that a law violated the ex post facto clause if it retrospectively "disadvantaged" a prisoner. In Waldrup, we applied this same terminology. **In Collins, however, the United States Supreme Court stated that a law is ex post facto if it punishes as a crime an act previously committed which was innocent when done, makes more burdensome the punishment for a crime after its commission, or deprives one charged with crime of any defenses available according to the law at the time the act was committed. In Morales, the Court subsequently concluded that a law must do more than simply 'disadvantage' an inmate to violate the ex post facto clause. The Court stated that a law violates the ex post facto clause if it (1) operates retrospectively and (2) alters the definition of criminal conduct or increases the penalty by which a crime is punishable as set forth in Collins. Morales, 115 S. Ct. at 1602 n. 3. The Court noted, however, that, in situations like those at issue in Weaver, the clause was violated because the new law enhanced the measure of punishment by altering the available gain-time. Id. at 1601-02. Likewise, the rule amendment in the instant case, as did the statute in Waldrup, retrospectively enhances the measure of punishment by altering the available gain-time."**

(Emphasis supplied.) Finally, the Florida Supreme Court

recognized that the facts in the case at bar are entirely different than those in **Morales**. Thus this state's highest court noted:

> "Further, the facts of the instant case are distinguishable from those in Paschal and Morales. In those cases, it was determined that the parole procedures could be amended because they merely altered the method to be followed in fixing a parole date. **Here, the procedure for implementing the award of gain-time has not merely been altered; it has been changed to completely eliminate the ability of certain classes of inmates to receive gain-time even if they carry out their work in an outstanding manner as provided by the statute.**"

(See the Petition for Certiorari, Appendix, A-9, emphasis supplied.)

Thus, the attorney general's contention that the Florida Supreme Court, in conducting its ex post facto analysis, relied upon the "disadvantaged offender" test applied in **Weaver** but modified by this Court in **California Dept. of Corrections v. Morales**, __ U. S. ___, 115 S. Ct. 1597, 1602, n. 3 (1995) -- is incorrect and a misrepresentation of the meticulous extent to which the Florida Supreme Court applied this court's decisions in **Weaver**, **Morales** and **Collins** to the facts in the case at bar.

This Honorable Court Should Give Due Deference To the Supreme Court of Florida's Decision In **Gwong**.

In **Mullaney v, Wilber**, 421 U. S. 684,691 (1975), it was noted that "(t)his court repeatedly has held that state

courts are the ultimate expositors of state law (citation omitted) and that we are bound by their constructions except in extreme circumstances..." In **Waldrup v. Dugger**, 562 So. 2nd 687 (Fla. 1990), the Florida Supreme Court carefully analyzed Florida's incentive gain time statute, section 944.275, Fla. Stat. (1985) in terms of the word "may," the amount of discretion the department had under that statute and the context of prevailing decisions of this court. The court said in this regard at 562 So.2d 692:

> "The state argues that this does not render the law ex post facto, since the availability of incentive gain-time is nothing but a 'mere expectancy' dependent entirely on the discretion of DOC. Be that as it may, we are forced to conclude that the 1983 amendment renders the statute ex post facto because it actually disadvantages Waldrup within the meaning of the relevant case law.
>
> Indeed, the argument advanced by the state sounds very much like the discredited analysis employed by this court in Harris v. Wainwright, 376 So.2d 855 (Fla. 1979). In Harris we had denied relief after an inmate was subjected to a retroactive gain-time statute that had reduced the maximum number of gain-time days that could be awarded to him. We held that
>
> > gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified or denied.
>
> Harris, 676 So. at 856.
>
> The United States Supreme Court in Weaver directly overruled Harris finding that [c]ontrary to the reasoning of the supreme court of Florida, a law need not impair a vested right to violate the ex post facto provision.... Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair

notice and governmental restraint when the legislature increases the punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Weaver, 450 U.S. at 29-31, 101 S.Ct. at 964-65. The Weaver Court went on to reject the state's argument that an alteration in gain-time was not actually an alteration in sentence. Gain-time, held the Weaver Court, "is one determination of petitioner's prison term." Id. at 32, 101 S.Ct. at 966. In conclusion, the Weaver Court found the retroactive gain-time statute void to the extent that it "reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks." Id. at 33, 101 S.Ct. at 967.

It could not be clearer that the analysis in Weaver applies as fully to discretionary gain-time as it does to "mandatory" gain-time, if the latter has ever truly existed in Florida. The Eleventh Circuit has reached this conclusion in a recent case raising exactly the issue before this Court today. Raske, 876 F.2d at 1499-1500. We agree with the Eleventh Circuit's analysis in Raske. Even the "grace" of the legislature, once given, cannot be rescinded retrospectively. Id. The Weaver opinion makes it plain that the ex post facto clause applies with equal vigor to a retroactive reduction in DOC's discretion to grant gain-time. Such plainly is the case before us today.

Accordingly, upon this opinion becoming final, DOC shall be barred from applying the 1983 reduction in incentive gain-time to inmates convicted of offenses occurring before the effective date of the 1983 act. As to Waldrup and similarly situated inmates the effect of this holding is two-fold: To reinstate the incentive gain-time statutes in force at the time of offense and to declare unconstitutional the 1983 incentive gain-time revisions as

applied to these inmates. DOC thus shall recompute incentive gain-time for Waldrup and similarly situated inmates based on the formulas, and in light of the criteria, contained in the pre-1983 statute."

Waldrup v. Dugger, 562 So.2d at 692, emphasis supplied.

Thus, with regard to the interpretation of the incentive gain time statute in general and the meaning of the word "may" contained therein, the Florida Supreme Court has determined that under the language of section 944.275(4)(b), Fla. Stat. (1985), while the department retains the discretion to determine how much incentive gain time an inmate earns each month, it does not have the power to reduce the pool of inmates who were eligible to receive same each month. The **Waldrup** opinion is consistent with **Raske v. Martinez**, 876 F.2d 1496 (11th Cir. 1989) which preceded it and the **Gwong** decision which followed and which is discussed in detail above. We believe that deference to the state court is appropriate from the Supreme Court of the United States regarding the statutory interpretation of section 944.275(4)(b), Fla. Stat. (1985) under these circumstances.

The Claim That Florida Will Be Irreparably Harmed By The Release of Inmates Convicted of Violent Crimes And Sex Offenses If The Writ Is Not Issued Is Incorrect.

The petitioner's claim that nullification of the Florida Supreme Court's October 10, 1996 decision in **Gwong** is necessary to avoid irreparable harm to this state is just false. There are more than 66,000 inmates in the Florida prison system most of whom are not affected by the **Gwong**

decision. (Gwong's Appendix to Response to Application for Stay, A-1.) By the very nature of their crimes and finite sentences, scores of violent and sex offenders necessarily expire their sentences and are released every day. (Gwong's Appendix to his Response to Application for Stay, A-2,3.) As noted above, Florida has by statute allowed violent and sex offenders to earn incentive gain time and thereby reduce the amount of time they will be incarcerated for more than two decades -- despite the belated contention made here that the department could have stopped this practice at any time by merely adopting a rule to that effect. Admittedly, some of the 22,000 prisoners whose ability to earn incentive gain time was unconstitutionally interfered with on April 21, 1996 have been and will continue to be released as they expire their respective sentences in part by accumulating work gain time -- but that is as it should be. It would be a travesty of justice if Florida could continue to deny these persons their constitutional right not to be illegally imprisoned. A state which falsely imprisons a citizen beyond his or her termination of incarceration date is a police state.

The Florida Supreme Court, carefully adhering to this court's decisions in **Weaver**, **Morales** and **Collins**, found that eliminating Gwong's ability to earn incentive gain time did not just "disadvantage" him in some speculative or nebulous way. Instead it quantifiably produced an actual increase in the period of incarceration attached to the

covered crimes because it prevented him from reducing the actual time he must remain in prison by up to 20 days per month. See §944.275(4)(b), Fla. Stat. (1985). That reasoned and respectful decision should not be disturbed.

As To The Petitioner's Claim That A Decision In This Case Should Be Governed by This Court's Pending Decision In **Lynce v. Mathis**.

Finally, we address the petitioner's claim (see the Petition for Certiorari, Appendix, A-32-36) that this court's anticipated decision in **Lynce v. Mathis**, United States Supreme Court Case No. 95-7452, "...might be dispositive of the issues in the instant case." (The Application for Stay, page 2.) This argument demonstrates the way in which the petitioner has manipulated the issue to suit itself even when doing so results in duplicity. The issue in **Lynce** does not involve incentive gain time. Instead it involves "...the State of Florida's revocation of provisional credits and administrative gain-time awarded to inmates as a means of relieving prison overcrowding." (The Petition for Certiorari, Appendix, A-33) The Department suggests that there is a distinct similarity of the issues in Gwong and Lynce. (The Petition for Certiorari, Appendix, A-33,34.) The department made **the exact opposite argument** to the this court during the course of the **Lynce v. Mathis** litigation -- claiming instead that incentive gain time (the subject matter in **Gwong**) and provisional credits (the subject matter in **Lynce**) are completely different in all respects -- especially in

terms of the applicability of the *ex post facto* clause.

Thus in its answer to Lynce's habeas corpus petition filed in the United States District Court for the Middle District of Florida, Orlando Division, the department stated emphatically:

> "Petitioner apparently believes that early release credits are the equivalent to the basic gaintime addressed in Weaver v. Graham, 450 U. S. at 24 **and the incentive gaintime addressed in Raske v. Martinez, 876 F. 2nd 1496 (11th Cir. 1989) and Waldrup v. Dugger, 562 So.2d 687 (Fla. 1990). However, the similarities are limited to the nomenclature. Both basic and incentive gaintime relate to the sentence imposed, and a release date reduced by these awards can be reasonably predicted, based upon the length of the term meted out.** Basic gaintime is applied as a lump sum award to reduce the over all length of sentence the day the prisoner enters the prison gates. While not necessarily a part of the sentence in a technical sense, the award of basic gaintime is ar (sic) quantifiable determinant of a prisoner's overall term, which, as the Supreme Court recognized in Weaver, may operate as a 'factor... [in] the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' **Similarly, the potential to earn incentive gaintime for labor performed and constructive activities, although contingent upon performance and good behavior, is also quantifiable based upon length of sentence imposed. Thus, to the extent that these two types of 'gaintime' operate in tandem with the length of sentences imposed, they affect the 'quantum of punishment' which attaches at the time the crime is committed."**

(See the Joint Appendix in **Lynce v. Mathis**, ___ U. S. ___, Case No. 95-7452, pages 42,44, emphasis added.) In other words, in its answer to the *habeas corpus* petition in the Middle District of Florida in **Lynce**, the department admitted that Florida's basic and incentive gain time statutes are

substantive, quantifiable parts of the quantum of punishment and therefore subject to the *Ex Post Facto* Clause of the United States Constitution. Provisional credits on the other hand (according to the department) are distinguishable because they are merely procedural mechanisms to manage prison overcrowding -- and therefore not the subject matter of *Ex Post Facto* analysis. Thus the department added:

> "Conversely, the eligibility and receipt by a prisoner of early release awards, whether those awards are called 'gaintime', 'credits', 'allotments', etc., is in no way tied to overall length of sentence. The need for and application of such awards are contingent upon many outside variables which contribute to prison overcrowding. There is no relationship to the original penalty assigned to the crime at the time it was committed nor to the ultimate punishment meted out. The sole purpose of the early release statues is to provide a temporary mechanism to alleviate the administrative crisis created by prison overcrowding while continuing to protect the public from violent offenders. The statutes are procedural in nature -- their purpose directed to alleviating the administrative crisis of prison overcrowding not to the traditional purposes of punishment. Consequently, Florida's early release statutes create no 'substantial personal rights' relating directly to the definition of crimes, defense or punishment, as defined and limited by the Supreme Court's decision in Youngblood.

(The Joint Appendix in **Lynce v. Mathis**, supra, pages 45, 46, emphasis supplied.)

CONCLUSION

For the reasons set out above, this honorable court is requested to deny the petition for certiorari.

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Respondent.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been provided counsel for petitioner, Hon. Marty E. Moore, Deputy General Counsel, the Office of the Attorney General of Florida, The Capital Building, Plaza Level One, Tallahassee, Florida 32399-1050, by United States mail delivery, this 3rd day of ~~January~~ February, 1997.

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